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No. _____ OFFICE OF THE CLERK

In the

Supreme Court of the United States

UNITED STATES OF AMERICA EX REL. MOUNTHASONE BOTT; UNITED STATES OF AMERICA EX REL. SUSAN NEWMAN,

Petitioners,

v.

SILICON VALLEY COLLEGES; WESTERN CAREER COLLEGES; GREG NATHANSON; ELLIS C. GEDNEY; DARRYL LINDSEY; ALMICH & ASSOCIATES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 487 (a)(20) of the Higher Education Act, 20 U.S.C. § 1094(a)(20), prohibits proprietary schools from paying any incentive compensation to their recruiters tied "directly or indirectly" to success in securing enrollments. The recruiter compensation statute is part of the eligibility requirements for students attending such proprietary schools to receive federal educational grants and insured student loans to pay the cost of their education.

The original implementing regulation adopted by the U.S. Department of Education, 34 C.F.R. § 668.14 (b)(22) (April 29, 1994), repeated the statutory language without elaboration. In 2002, eight (8) years after the passage of 20 U.S.C. 1094(a)(20), the U.S. Department of Education promulgated a new implementing regulation. 34 C.F.R. § 668.14(b) (22) (ii) (A) (Nov. 1, 2002).

The Ninth Circuit interpreted the 2002 regulation to permit mandatory minimum enrollment quotas for proprietary school recruiters.

QUESTION 1:

Does 34 C.F.R. § 668.14(b) (22) (ii) (A) (Nov. 1, 2002) conflict with the recruiter compensation statute, 20 U.S.C. 1094(a)(20)? Did the U.S. Department of Education exceed its rulemaking authority in adopting a regulation that is inconsistent with the Higher Education Act?

QUESTION 2:

Does the 2002 regulation violate the General Education Provisions Act ("GEPA"), 20 U.S.C. § 1232(a), which prohibits the U.S. Department of Education from adopting implementing regulations more than 360 days following the passage of a statute under the Higher Education Act?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Plaintiffs are Mounthasone Bott and Susan Newman, bringing this action on behalf of the United States.

Defendants are Silicon Valley Colleges, Western Career Colleges, Ellis C. Gedney, Darryl Lindsey, Greg Nathanson, and Almich & Associates. No public company owns more than 10% of Silicon Valley Colleges or Western Career Colleges.

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OPINIONS BELOW

The Ninth Circuit's panel opinion was rendered on January 4, 2008. The opinion is not reported. The order denying appellants' application for rehearing, and suggestion for rehearing *en banc* was entered on March 31, 2008 and is not reported. The district court's order denying relators' motion for leave to file motion for reconsideration was entered on January 4, 2006. The district court orders granting defendants' motions to dismiss were entered on October 5, 2005 and July 13, 2005. The lower court decisions are not reported.

JURISDICTION

The judgment of the Ninth Circuit was entered on January 4, 2008. Petitioner's timely petition for rehearing and suggestion for rehearing en banc was denied on March 31, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 487 (a)(20) of the HEA, 20 U.S.C. § 1094(a)(20), provides in relevant part:

> The agreement shall condition the initial and continuing eligibility of an institution to participate in a program upon compliance with the following:
> * * *
> (20) The institution will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any

> persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance, except that this paragraph shall not apply to the recruitment of foreign students residing in foreign countries who are not eligible to receive Federal student assistance.

Section 34 C.F.R. § 668.14 (b)(22) (April 29, 1994) provides in relevant part:

> (b) By entering into a program participation agreement, an institution agrees that —
> ....
> (22) It will not provide, nor contract with any entity that provides, any commission, bonus, or other incentive payment based directly or indirectly in securing enrollments....

Section 34 C.F.R. § 668.14(b) (22) (ii) (A) (Nov. 1, 2002) provides in relevant part:

> (22)(i) It will not provide any commission, bonus, or other incentive payment based directly or indirectly upon success in securing enrollments or financial aid to any person or entity engaged in any student recruiting or admission activities or in making decisions regarding the awarding of title IV, HEA program funds, except that this limitation does not apply to the recruitment of foreign students residing in foreign countries who are not eligible to receive title IV, HEA program funds.

(ii) Activities and arrangements that an institution may carry out without violating the provisions of paragraph (b)(22)(i) of this section include, but are not limited to:

(A) The payment of fixed compensation, such as a fixed annual salary or a fixed hourly wage, as long as that compensation is not adjusted up or down more than twice during any twelve month period, and any adjustment is not based solely on the number of students recruited, admitted, enrolled, or awarded financial aid. For this purpose, an increase in fixed compensation resulting from a cost of living increase that is paid to all or substantially all full-time employees is not considered an adjustment.

(B) Compensation to recruiters based upon their recruitment of students who enroll only in programs that are not eligible for title IV, HEA program funds.

(C) Compensation to recruiters who arrange contracts between the institution and an employer under which the employer's employees enroll in the institution, and the employer pays, directly or by reimbursement, 50 percent or more of the tuition and fees charged to its employees; provided that the compensation is not based upon the number of employees who enroll in the institution, or the revenue they generate, and the recruiters have no contact with the employees.

(D) Compensation paid as part of a profit-sharing or bonus plan, as long as those payments are substantially the same

amount or the same percentage of salary or wages, and made to all or substantially all of the institution's full-time professional and administrative staff. Such payments can be limited to all, or substantially all of the full-time employees at one or more organizational level at the institution, except that an organizational level may not consist predominantly of recruiters, admissions staff, or financial aid staff.

(E) Compensation that is based upon students successfully completing their educational programs, or one academic year of their educational programs, whichever is shorter. For this purpose, successful completion of an academic year means that the student has earned at least 24 semester or trimester credit hours or 36 quarter credit hours, or has successfully completed at least 900 clock hours of instruction at the institution.

(F) Compensation paid to employees who perform clerical "pre-enrollment" activities, such as answering telephone calls, referring inquiries, or distributing institutional materials.

(G) Compensation to managerial or supervisory employees who do not directly manage or supervise employees who are directly involved in recruiting or admissions activities, or the awarding of title IV, HEA program funds.

(H) The awarding of token gifts to the institution's students or alumni, provided that the gifts are not in the form of money,

no more than one gift is provided annually to an individual, and the cost of the gift is not more than $100.

(I) Profit distributions proportionately based upon an individual's ownership interest in the institution.

(J) Compensation paid for Internet-based recruitment and admission activities that provide information about the institution to prospective students, refer prospective students to the institution, or permit prospective students to apply for admission on-line.

(K) Payments to third parties, including tuition sharing arrangements, that deliver various services to the institution, provided that none of the services involve recruiting or admission activities, or the awarding of title IV, HEA program funds.

(L) Payments to third parties, including tuition sharing arrangements, that deliver various services to the institution, even if one of the services involves recruiting or admission activities or the awarding of title IV, HEA program funds, provided that the individuals performing the recruitment or admission activities, or the awarding of title IV, HEA program funds, are not compensated in a manner that would be impermissible under paragraph (b)(22) of this section.

Section 20 U.S.C. § 1232(a), the General Education Provisions Act ("GEPA"), provides in relevant part:

> [n]ot later than 60 days after the date of enactment of any Act, or any portion of any Act, affecting the administration of any applicable program.... Such schedule shall provide that all such final regulations shall be promulgated within 360 days after the date of enactment of such Act or portion of such Act.

STATEMENT OF CASE

Proceedings Below.

This action was instituted as a *qui tam* proceeding under the False Claims Act, 31 U.S.C. §§ 3729-3733. It alleges that defendants made false claims for federal student financial aid under Title IV of the Higher Education Act ("HEA"). Relators Mounthasone Bott and Susan Newman were recruiters at the San Jose, California campus of defendant Silicon Valley College. Relators initiated the action by filing a complaint *in camera* and under seal in the U.S. District Court for the Northern District of California. Service of process upon the defendants deferred was required by 31 U.S.C. § 3730(b)(2). The United States elected to decline to intervene. The district court ordered the file unsealed.

Defendants moved to dismiss plaintiff's original complaint. The United States Department of Justice filed a statement of interest in opposition to defendants' motion to dismiss. The United States argued that violation of the HEA's recruiter compensation statute is actionable under the False Claims Act as alleged by relators The district court held that mandatory minimum enrollment quotas did

not violate the safe harbor implementing regulations adopted in 2002, and granted defendants' motions to dismiss. Relators were granted leave to amend. Relators filed plaintiff's an amended complaint in response to the ruling. Defendant moved to dismiss plaintiff's amended complaint. On October 5, 2005, the district court dismissed Relators' amended complaint, and signed a final judgment dismissing the action with prejudice. The court had offered Relators a second opportunity to amend, which was declined due to the court's interpretation of the regulation at issue.

The Ninth Circuit ruled *per curiam* that the regulation was a reasonable interpretation of the Higher Education Act under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

(i) Statement of Facts

Defendant colleges received $175 million in student tuition paid by federally insured student loans and grants in the period under suit. Beginning in 1997, recruiters were required to sign employment contracts containing mandatory minimum quotas. Recruiters who failed to enroll their minimum quotas were terminated. Recruiters who exceeded their minimum quotas were given raises. The premise of relators' claim is that the mandatory enrollment quotas constituted an incentive salary structure that violated the prohibition in 20 U.S.C. 1094(a)(20).

Plaintiff's contentions are that the colleges violated the False Claims Act ("FCA"), 31 U.S.C. § 3729-3733,

by obtaining federal student financial aid they were ineligible to receive because their students were enrolled by recruiters who had to meet mandatory minimum enrollment quotas, or the recruiters would be fired. Such recruiters were compensated directly and indirectly based on the number of students they enrolled, in direct violation of 20 U.S.C. § 1094(20).

REASONS FOR GRANTING THE WRIT

The U.S. Department of Education has overstepped its authority with this regulation. Executive agencies, functioning as the "fourth branch of the Government," may not subvert the statutes under which they operate. The Department of Education acted legislatively, and thus unconstitutionally, by exceeding the parameters of the Higher Education Act, 20 U.S.C. § 1094(a)(20). *See, INS v. Chadha*, 462 U.S. 919, 967-969 (1983).

The "Internet Equity and Education Act of 2001" was passed by the House in 2001. The bill allowed for "salary adjustments" twice a year to relax the strict statutory ban against providing recruiters with any financial stake in outcome of a student's decision to enroll at the college. *See*, H.R. 1992, 107TH CONG., 1ST SESS. § 484C (2001). The "salary" exception would have allowed an inducement to increase enrollment by basing recruiter compensation on the number of enrollments generated. Under the amendment, only compensation "based *directly* on success" in securing enrollments — straight commissions and bonuses — would be disallowed [the word "indirectly" would have been eliminated from the

existing law]. The House bill passed on October 10, 2001.

The companion Senate bill never came up for a vote, and the measure failed. S. 1445, 107TH CONG., 1ST SESS. § 484C (2001).

Congress very directly addressed the precise changes contained in the 2002 regulation only one year earlier, when it considered amending 20 U.S.C. § 1094(a)(20). Congress rejected the language subsequently adopted into the regulation. *Chevron U.S.A. Inv. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The U.S. Department of Education adopted the very exceptions that Congress refused to add to the statute prohibiting the payment of incentives compensation to recruiters at proprietary schools.

The 2002 regulation, however, contains thirteen (13) exceptions to the original statutory -- and regulatory -- provision. According to comments contained in the Federal Register, the U.S. Department of Education issued the safe harbors because, in the Agency's view, the prohibition on paying incentive compensation to recruiters is outmoded and unnecessary:

> "incentive payments are now just one of several remedies in place that prevent schools from unscrupulously recruiting qualified students."

67 Federal Register 67054 (Nov. 1, 2002). Congress made no exception for the so-called safe harbors

contained in 34 C.F.R. § 668.14(b)(22)(ii)(A) (Nov. 1, 2002).

A regulation that is in conflict with a statute "is a mere nullity." *Manhattan Gen. Equip. Co. v. Comm'r*, 297 U.S. 129, 134 (1936). "A regulation may not amend a statute." *Cal. Cosmetology Coalition v. Riley*, 110 F.3d 1454, 1460-61 (9th Cir. 1997).

"No money shall be drawn from the Treasury, but in consequence of appropriations made by law." Art. I, Sec. 9, Cl. 7. The constitutional limitation is absolute, and forbids payment of Government funds contrary to the will of Congress. "The oft-quoted observation in *Rock Island, A.& L.R. Co. v. United States*, 254 U.S. 141, 143, 65 L.Ed. 188, 189, 41 S.Ct. 55 that 'Men must turn square corners when they deal with the Government,' does not reflect a callous outlook. It merely expresses the duty of all courts to observe the condition defined by Congress for charging the public treasury." *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947). "Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law." *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 63 (1984). "[P]ublic funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good, and not according to the individual favor of Government agents or the individual pleas of litigants." *OPM v. Richmond*, 496 U.S. 414, 428 (1990).

The regulation is void under the General Education Provisions Act. Under the General Education Provisions Act ("GEPA"), 20 U.S.C. § 1232(a), the Department of Education must submit a schedule for

promulgating regulations "[n]ot later than 60 days after the date of enactment of any Act, or any portion of any Act, affecting the administration of any applicable program.... Such schedule shall provide that all such final regulations shall be promulgated within 360 days after the date of enactment of such Act or portion of such Act." The 2002 regulation was adopted long after the statutory time bar that the U.S. Department of Education is allowed to promulgate regulations following passage a statute under the HEA. The U.S. Department of Education was time barred by more than eight years under the timetable for adopting regulations set forth in § 1232, which allows a maximum of 360 days after Congress enacts a statute under the HEA to adopt new regulations.

The Department of Justice filed briefs and appeared in several actions to obtain clarity on the responsibility of proprietary schools with respect to funds received while such entities are acting in violation of 20 U.S.C. 1094(a)(20). *See, e.g., United States ex rel. Main v. Oakland City College*, 426 F.3d 914 (7th Cir. 2005); *United States ex. rel. Hendow v. University of Phoenix*, 461 F.3d 1166 (9th Cir. 2006), *cert. den.*, 127 S.Ct. 2099, 167 L. Ed. 2d 813, 2007 U.S. LEXIS 4358.

Respectfully Submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06-15423
D.C. No. CV-04-00320-CW

[Filed January 4, 2008]

UNITED STATES of America ex rel. MOUNTHASONE BOTT; UNITED STATES of America ex rel. SUSAN NEWMAN, Plaintiffs - Appellants,	)
v.	)
SILICON VALLEY COLLEGES; WESTERN CAREER COLLEGES; GREG NATHANSON; ELLIS C. GEDNEY; DARRYL LINDSEY; STEVE GALLAGHER; BARBARA BICKETT; JANETTE C. MARQUEZ; PATRICK SUTHERLAND; U.S. EDUCATION CORPORATION; GEORGE MONTGOMERY; LESLIE E. PRITCHARD; ALMICH & ASSOCIATES, Defendants - Appellees.	)

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued and Submitted December 7, 2007
San Francisco, California

MEMORANDUM*

Before: **KOZINSKI**, Chief Judge, **COWEN**** and **HAWKINS**, Circuit Judges.

1. Relators have not pled with sufficient particularity any facts indicating that the periodic salary adjustments violated the Higher Education Act or its associated regulations. The Act does not prohibit salary reviews generally, but rather bars the payment of a "commission, bonus, or other incentive payment" solely on the basis of recruitment success. 20 U.S.C. § 1094(a)(20). Relators have not pled specific facts supporting the inference that salary reviews were performed solely on the basis of recruiting success. Nor have relators pled with sufficient particularity any facts demonstrating that the salary review system was merely a sham mechanism for funneling improper incentive pay. *See Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001). *Cf. United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166,

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

1169-70 (9th Cir. 2006) (alleging fraud with sufficient particularity).

2. The decision to fire an employee is not covered by the Act because termination is not a prohibited "commission, bonus, or other incentive payment." 20 U.S.C. § 1094(a)(20).

3. We need not determine whether the safe harbor regulation is actually valid. If defendants complied with a facially valid regulation, relators cannot show the required scienter under the False Claims Act for actions after the safe harbor regulation was promulgated. *See United States ex rel. Hochman v. Nackman*, 145 F.3d 1069, 1073-74 (9th Cir. 1998). The safe harbor regulation is not facially invalid because the Higher Education Act prohibits direct or indirect bonuses, while the regulation specifies permissible means by which to calculate base salaries. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 04-320 CW

[Filed January 4, 2006]

UNITED STATES OF AMERICA, Ex Rel. MOUNTHASONE BOTT and SUSAN NEWMAN,	)
Plaintiffs,	)
v.	)
SILICON VALLEY COLLEGES, et al.,	)
Defendants.	)

ORDER DENYING RELATORS' MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION

Relators Mounthasone Bott and Susan Newman move for leave to file a motion for reconsideration of the Court's October 5, 2005 order dismissing with prejudice their second amended complaint (SAC). Defendants U.S. Education Corporation (USEC),

Silicon Valley Colleges and Western Career Colleges (the Colleges), and Greg Nathanson, Ellis C. Gedney and Darryl Lindsey (collectively, USEC Defendants) and Defendant Almich & Associates (Almich) separately oppose the motion. Having considered all of the papers filed by the parties, the Court denies Relators' motion.

BACKGROUND

Relators brought this *qui tam* action under the False Claims Act (FCA), 31 U.S.C. § 3729 *et seq*, against all Defendants on behalf of the United States to recover all federal educational grants, including Pell Grants, and all payments on federally insured educational loans used to fund students at the Colleges. Relators alleged that Defendants knowingly and falsely stated that they were eligible to participate in grant and loan programs as authorized by Title IV of the Higher Education Act (HEA), 20 U.S.C. § 1070 *et seq*. 20 U.S.C. § 1094(a). The Colleges' eligibility is conditioned upon compliance with certain requirements, among others,

> The institution will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance . . . .

Id. § 1094(a)(20). The Department of Education (ED) has promulgated "safe harbor" regulations, which

clarify that institutions may provide their admissions representatives with

> fixed compensation, such as a fixed annual salary or a fixed hourly wage, as long as that compensation is not adjusted up or down more than twice during any twelve month period, and any adjustment is not based solely on the number of students recruited, admitted, enrolled, or awarded financial aid. For this purpose, an increase in fixed compensation resulting from a cost of living increase that is paid to all or substantially all full-time employees is not considered an adjustment.

34 C.F.R. § 668.14(b)(22)(ii)(A).

In their first amended complaint (FAC), Relators alleged that Defendants violated the federal law prohibiting incentive payments to admissions representatives by paying recruiters a "so-called 'salary' . . . that was directly tied to an enrollment quota for that recruiter." FAC ¶ 47. Pursuant to this alleged arrangement, recruiters who failed to enroll their minimum quota were terminated, while those who exceeded the minimum quota were retained and given raises.

In its July 13, 2005 order, the Court dismissed the FAC pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim and for failure to comply with Federal Rule of Civil Procedure 9(b)'s requirement that the FCA allegations of fraud be plead with particularity. The Court found that the FAC failed to state an FCA claim because the USEC

Defendants' alleged system of recruitment quotas, in which employees who fail to meet the minimum enrollment quotas are fired and those who exceed the minimum are retained and given raises, fell within the safe harbor provisions of the ED's regulations. The Court reasoned that, although pay adjustments could not be based "solely" on the number of students recruited, the safe harbor provision reflected the ED's understanding that institutions could base salaries or salary increases on merit. The Court found that, in fact,

> Relators have not alleged any conduct that falls outside the safe harbor regulations. For example, they have not alleged that the Colleges provide more than two salary adjustments in a year not related to cost-of-living, or adjustments based "solely on the number of students" recruited.

July 13 Order at 10. Because the practices alleged were protected by the regulations, the Court concluded that Defendants could not be held liable for fraud under the FCA, even if the ED regulations were inconsistent with the HEA.

In their SAC, Relators alleged generally and repeatedly that the Colleges paid their recruiters based "solely" on their success at enrolling students. They specifically alleged that Ms. Bott was given a minimum enrollment quota of approximately twelve students per month, and that she was fired after three months "solely because she failed to meet her enrollment quota." *Id.* ¶ 18. Relators alleged that sales representative Indy De Croos received two

$10,000 raises based "solely" on his continued success at securing enrollments. They alleged that Ms. Newman was "terminated solely for failing to meet her enrollment quota." *Id.* ¶ 25. In opposing Defendants' motions to dismiss the SAC, Relators insisted that these allegations of a compensation system related to mandatory minimum enrollment quotas and raises for those who exceeded quotas were sufficient to plead actionable fraud. At the September 16, 2005 hearing on Defendants' motions to dismiss the SAC, counsel for Relators stated that if the Court decided that Relators still had failed to plead fraud under the FCA in their SAC, Relators would prefer that the Court dismiss the case with prejudice to enable Relators to pursue an appeal.

In its October 5, 2005 order, the Court did find that the SAC's allegations did not demonstrate conduct by Defendants falling outside the protection of the ED's safe harbor regulations, and thus that Relators' claims were not stated with specificity as required by Rule 9(b). It found that other than insertion of the word "solely," the SAC's allegations did not differ substantially from the quota system described in the FAC, which the Court had found fell within the safe harbor provision. It found that in order to state their fraud claim, Relators would have to "allege with specificity a direct relationship between the raises given and the number of students enrolled," and that merely using the word "solely" was not specific enough. It also found that the allegations against the individual USEC Defendants, Nathanson, Gedney and Lindsey were so vague and conclusory that they did not allow each individual to know how he was alleged to have participated in the Colleges' conduct, and that

the allegations against Almich were likewise insufficient to state with particularity circumstances for which Almich could be held liable for false or fraudulent statements, even if the complaint had met Rule 9(b) requirements with respect to the USEC Defendants. The Court entered judgment in Defendants' favor on October 5, 2005.

LEGAL STANDARD

Relators move for leave for reconsideration pursuant to Federal Rule of Civil Procedure 59(e), which provides that a motion to alter or amend a judgment may be made within ten days of entry of judgment. However, the motion was filed on October 24, 2005, more than ten days after the October 5 entry of judgment. Therefore, the motion is treated as one for relief from final judgment under Rule 60(b). *See Am. Ironworks & Erectors, Inc., v. North Am. Const. Corp.*, 248 F.3d 892, 898-99 (9th Cir. 2001) (noting that a motion for reconsideration "is treated as a motion to alter or amend judgment under Federal Rule of Civil Procedure Rule 59(e) if it is filed within ten days of entry of judgment. Otherwise, it is treated as a Rule 60(b) motion for relief from a judgment or order.") (internal citation omitted).

Rule 60(b) is not merely a device to get another try; it is not an equitable response to the request for "just one more time, please." Rule 60(b) enumerates the grounds upon which a motion for relief from an order or judgment may be made. It specifies the following:

1) mistake, inadvertence, surprise or excusable neglect;

2) newly discovered evidence which by due diligence could not have been discovered before the court's decision;

3) fraud by the adverse party;

4) the judgment is void;

5) the judgment has been satisfied; or

6) any other reason justifying relief.

For the purposes of subparagraph (1), "gross carelessness" is insufficient to warrant reconsideration; nor is it sufficient that the party is "unhappy with the judgment." *See* 11 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2858 at 170 (1973). "Mistake" in subparagraph (1) includes legal error by the Court. *Yniques v. Cabral*, 985 F.2d 1031, 1034 (9th Cir. 1993) ("[A] district court's erroneous reading of the law is a 'mistake' sufficient to require reconsideration of an order."). The terms contained in subparagraph (1), including "excusable" are interpreted strictly. A motion made under subparagraph (6) requires a showing that the grounds justifying relief are extraordinary. Again, the mere dissatisfaction with the court's order, or belief that the court is wrong in its decision, are not grounds for relief under subparagraph (6) or, for that matter, under any other subparagraph of Rule 60(b).

"'[T]he major grounds that justify reconsideration involve an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" *Pyramid*

Lake Paiute Tribe of Indians v. Hodel, 882 F.2d 364, 369 n.5 (9th Cir. 1989) (quoting *United States v. Desert Gold Mining Co.*, 433 F.2d 713, 715 (9th Cir. 1970)).

DISCUSSION

Relators move for leave to file a motion for reconsideration of the Court's October 5 order on the grounds that the Court erred in applying the Rule 9(b) standard too strictly, because the additional specificity required involves information peculiarly within Defendants' control.[1] *See United States ex rel. Thompson v. Columbia / HCA Healthcare Corp.*, 20 F. Supp. 2d 1017, 1049 (S.D. Tex. 1998) (allowing relators to proceed to discovery without naming individual false claims, dates and details where relators had alleged with specificity "basic framework, procedures, the nature of the fraudulent scheme, and the financial arrangements and inducements"); *United States ex rel. Johnson v. Shell Oil Co.*, 183 F.R.D. 204 (E.D. Tex. 1998) (holding that relators need not plead specific details of individual false claims, such as specific dates

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[1] In a "notice of supplemental authorities," Relators also bring to the Court's attention the recent decision in *United States of America ex rel. Main v. Oakland City University*, 426 F.3d 914 (7th Cir. 2005), in which the Seventh Circuit held that a for-profit educational institution could be held liable under the FCA for payment of contingent fees to recruiters (the court described the compensation scheme at issue as one in which admissions representatives were allegedly "paid by the head"). Had the Court reached the question of FCA liability for violations of the HEA, *Main* would have been relevant persuasive authority, but it did not do so.

and invoice numbers, in order to meet requirements of Rule 9(b)).

Relators fail to show that this new legal argument, which was not raised in their opposition to Defendants' motions to dismiss the SAC, justifies reconsideration of the judgment against them. Relators claim that discovery is needed before they can plead "the amounts of the raises paid and the exact number of enrollments generated beyond each recruiter's enrollment quota," as such information is within Defendants' control. Relators' purported need for discovery misinterprets the Court's October 5 ruling. The Court did not find that Relators failed to plead exact amounts of raises and enrollments. Rather, the Court found that Relators failed to plead with specificity a "direct relationship" between raises and enrollments, such as granting recruiters a raise each time they recruited a certain (if unspecified) number of students. Instead, the allegations in the SAC were consistent with a mandatory minimum quota scheme which the Court had previously determined fell within the safe harbor regulation. If Relators do not possess information that would allow them to allege with specificity conduct by Defendants that falls outside the ED's safe harbor provisions, then Relators lack the necessary factual basis on which to file an FCA complaint.

CONCLUSION

For the foregoing reasons, Relators' motion for leave to file a motion for reconsideration is DENIED (Docket No. 101).

IT IS SO ORDERED.

Dated: 1/4/06

/s/
CLAUDIA WILKEN
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 04-320 CW

[Filed October 5, 2005]

UNITED STATES OF AMERICA, Ex Rel. MOUNTHASONE BOTT and SUSAN NEWMAN,	)
Plaintiffs,	)
v.	)
SILICON VALLEY COLLEGES, et al.,	)
Defendants.	)

Defendants U.S. Education Corporation (USEC), Silicon Valley Colleges and Western Career Colleges (the Colleges), and Greg Nathanson, Ellis C. Gedney and Darryl Lindsey (collectively, USEC Defendants) move pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b) to dismiss the second amended complaint (SAC) of Relators Mounthasone Bott and Susan Newman (collectively, Relators). Defendant Almich & Associates (Almich) separately moves to

dismiss the SAC on the same grounds. Relators oppose the motions. The matters were heard on September 16, 2005.

Having considered all of the papers filed by the parties and oral argument on the motions, the Court grants the motions to dismiss.

BACKGROUND

Relators bring this *qui tam* action under the False Claims Act (FCA), 31 U.S.C. § 3729 *et seq*, against all Defendants on behalf of the United States to recover all federal educational grants, including Pell Grants, and all payments on federally insured educational loans used to fund students at the Colleges. The parties and claims are described in the Court's July 13, 2005 Order Granting Defendants' Motions to Dismiss.

As explained in that order, the Colleges must enter into a Program Participation Agreement (PPA) with the Secretary of Education in order to be eligible to participate in grant and loan programs authorized by Title IV of the Higher Education Act (HEA), 20 U.S.C. § 1070 *et seq*. 20 U.S.C. § 1094(a). The PPA conditions the Colleges' eligibility upon compliance with certain requirements, among others,

> The institution will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions

> regarding the award of student financial assistance . . . .

Id. § 1094(a)(20). The Department of Education (ED) has promulgated "safe harbor" regulations, which clarify that institutions may provide their admissions representatives with

> fixed compensation, such as a fixed annual salary or a fixed hourly wage, as long as that compensation is not adjusted up or down more than twice during any twelve month period, and any adjustment is not based solely on the number of students recruited, admitted, enrolled, or awarded financial aid. For this purpose, an increase in fixed compensation resulting from a cost of living increase that is paid to all or substantially all full-time employees is not considered an adjustment.

34 C.F.R. § 668.14(b)(22)(ii)(A). Nothing in the statute or the regulations addresses the conditions under which an institution may terminate its admissions representatives. In addition to the PPA, HEA requires that participating institutions submit to the ED the results of annual audits. 20 U.S.C. § 1094(c)(1)(A)(i).

In both the first amended complaint (FAC) and the SAC, Relators allege that Defendants falsely certified that the Colleges were in compliance with applicable federal law prohibiting incentive payments to admissions representatives. In the FAC, Relators alleged that they and other recruiters were paid a "socalled 'salary' . . . that was directly tied to an enrollment quota for that recruiter." FAC ¶ 47.

Pursuant to this arrangement, recruiters who failed to enroll their minimum quota were terminated, while those who exceeded the minimum quota were retained and given raises. In addition, admissions representatives who failed to "convert" a minimum percentage of leads into enrollments were also terminated. Relators also alleged in the FAC that Almich and another accounting firm, Weworski & Associates,[1] falsely certified in connection with annual audits that the Colleges were in compliance with federal eligibility requirements.

In its July 13, 2005 order, the Court dismissed the FAC pursuant to Rule 12(b)(6) for failure to state a claim and for failure to comply with Rule 9(b)'s requirement that the FCA allegations of fraud be plead with particularity.

The Court found that the FAC failed to state an FCA claim because the USEC Defendants' alleged system of recruitment quotas, in which employees who fail to meet the minimum enrollment quotas are fired and those who exceed the minimum are retained and given raises, fell within the safe harbor provisions of the ED's regulations. The Court reasoned that, although pay adjustments could not be based "solely" on the number of students recruited, the safe harbor provision reflected the ED's understanding that institutions could base salaries or salary increases on merit. The Court found that the regulations did not otherwise address the hiring and firing of admissions

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[1] The SAC does not name Weworski & Associates as a defendant.

representatives or an institution's ability to set mandatory recruitment quotas. The Court found that, in fact,

> Relators have not alleged any conduct that falls outside the safe harbor regulations. For example, they have not alleged that the Colleges provide more than two salary adjustments in a year not related to cost-of-living, or adjustments based "solely on the number of students" recruited.

July 13 Order at 10. Because the practices alleged were protected by the regulations, the Court concluded that Defendants could not be held liable for fraud under the FCA, even if the ED regulations were inconsistent with the HEA.

In the SAC, Relators allege generally and repeatedly that the Colleges "were paying commissions and other incentive compensation to recruiters based solely on their success at securing enrollments." SAC ¶ 13; *see also id.* ¶ 17 ("recruiters at SVC were paid substantial raises based solely on their success at securing enrollments"), ¶ 19 ("All Sales Representatives at [SVC] were paid solely based on the number of students they enrolled. . . . The salary of each sales representative was based solely on their enrollments."), ¶ 20 ("the enrollment quotas are assigned to the individual Sales Persons on the basis of the salaries they receive"), ¶ 21 (alleging that Mr. Nathanson informed Ms. Bott that "recruiters were rewarded according to success at securing enrollments") and ¶ 27 (recruiters "were promised they would receive raises based solely on their success in

securing enrollments beyond their minimum enrollment quotas . . . All recruiters who failed to meet their minimum enrollment quotas were terminated").

More specifically, Ms. Bott alleges that she had a minimum enrollment quota of approximately twelve students per month, and that she was fired after three months "solely because she failed to meet her enrollment quota." *Id.* ¶ 18. Relators allege that sales representative Indy De Croos was paid a starting salary of $40,000, and "received a $10,000 raise after his third month of employment solely based on the number of students he recruited. Indy received a second $10,000 raise later in the year based solely on his continued success as [sic] securing enrollments for the company." *Id.* ¶ 19. Relators also allege that other sales representatives were paid salaries varying between $50,000 and $90,000, but do not allege any additional details suggesting a specific relationship between those salaries and the number of students enrolled. Similarly, Ms. Newman alleges that, after enrolling eight students in her first two weeks of employment, she was told she "would receive a raise based solely on her ability to continue enrolling students" at that rate. *Id.* ¶ 24. One month later, she was "given a letter . . . stating that she was being terminated solely for failing to meet her enrollment quota." *Id.* ¶ 25. Relators also allege that USEC Defendants closely monitored sales representatives' enrollment figures, and that those who failed "to 'convert' a minimum percentage of leads into enrollments were also terminated." *Id.* ¶ 39.

The FAC alleged no details with respect to its claims against the individual Defendants or Almich.

The Court therefore found that Relators failed to allege with the requisite particularity their claims of fraud against those Defendants. In the SAC, Relators allege that individual Defendants Nathanson, Gedney and Lindsey "directed, authorized, ratified, and/or acted with knowledge or reckless indifference to the wrongful conduct described" in the SAC. *Id.* ¶¶ 5-7. Relators also allege that the recruiter compensation strategies described in the SAC were "conceived, designed, and implemented by the officers and shareholders Defendants Gedney, Lindsey, and Nathanson." *Id.* ¶ 78. Nathanson in particular is alleged to have "executed the Program Participation Agreements with the U.S. Department of Education on behalf of SVC and WCC." *Id.* ¶ 5. The SAC also states that Almich conducted compliance examinations of SVC for fiscal years 1997, 1998, 1999 and 2000; audited SVC's financial statements for fiscal years 1997, 1998, 1999, 2000, 2001 and 2002; and performed both the compliance examinations and the financial audits for WCC for fiscal years 1997, 1998, 1999, 2000, 2001 and 2002. *Id.* ¶ 8.

LEGAL STANDARD

"In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). The allegations must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). Statements of the time, place and nature of the alleged fraudulent activities are

sufficient, *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987), provided the plaintiff sets forth "what is false or misleading about a statement, and why it is false." *In re GlenFed, Inc., Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994). Scienter may be averred generally, simply by saying that it existed. *See id.* at 1547; *see* Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge, and other condition of mind of a person may be averred generally"). As to matters peculiarly within the opposing party's knowledge, pleadings based on information and belief may satisfy Rule 9(b) if they also state the facts on which the belief is founded. *Wool*, 818 F.2d at 1439.

DISCUSSION

I. Failure to Plead Fraudulent Statements with Specificity

Defendants move for dismissal on grounds, among others, that the SAC's allegations of conduct outside the protection of the ED's safe harbor regulations are not stated with the specificity required by Rule 9(b).

According to the SAC, Ms. Bott and Ms. Newman were fired "solely" for failing to meet their minimum enrollment quotas, and Mr. De Croos received one $10,000 raise "solely" based on the number of students he recruited and a second $10,000 raise in the same year based "solely on his continued success" at recruiting. Other than the insertion of the word "solely," the allegations do not differ substantially from the quota system described in the FAC, which the Court found fell within the safe harbor provision.

As the Court noted in its prior order, the ED's regulations were promulgated based on the assumption that the HEA does not prohibit institutions from basing "salaries or salary increases on merit," Dep't of Ed., Federal Student Aid Programs, 67 Fed. Reg. 67,048, 67,053 (Nov. 1, 2002), and neither the HEA nor the regulations otherwise addresses the hiring and firing of admissions representatives or quotas. The firing of Ms. Bott and Ms. Newman for failing to meet a mandatory quota does not constitute a "commission, bonus, or other incentive payment" prohibited by the HEA, and Relators in their opposition do not argue otherwise.

For admissions representatives responsible for increasing enrollment of students, there is necessarily a fine distinction between a permissible salary increase "based on merit" and an impermissible salary increase "based solely on the number of students enrolled." In order to state their fraud claim, Relators must allege with specificity a direct relationship between the raises given and the number of students enrolled. Other than frequently using the word "solely," the SAC does not do so. For instance, Relators do not provide any information demonstrating with specificity that there was a direct relationship between the number of students enrolled by Mr. De Croos and his two $10,000 raises. To the contrary, the specific facts alleged are equally susceptible to Defendants' interpretation, that fulfillment of quotas merely rendered Mr. De Croos eligible for two raises and thus fell within the safe harbor regulations. Without more detailed allegations showing the relationship between pay raises and the specific number of students actually enrolled by Mr. De Croos

or other admissions representatives, the Court finds that Relators have not described with particularity a pay structure that falls outside the safe harbor regulations.

As the Court explained in its previous order, such a pay structure would be necessary in order to maintain Relators' FCA action. *See* July 13, 2005 Order at 9-11. This reasoning applies as well to to the FCA claim against Almich, because Relators' fraud claim against it rests entirely on Almich's alleged ratification of the Colleges' alleged incentive payments. For these reasons, the Court finds that the SAC fails to meet Rule 9(b)'s requirement that the false or fraudulent statements by Defendants be alleged with particularity.

II. Failure to Plead Fraud with Respect to Specific Defendants

A. Individual USEC Defendants

USEC Defendants move for dismissal of the complaint on the grounds that the allegations against the three individual USEC Defendants, Nathanson, Gedney and Lindsey, fail to meet the requirements of Rule 9(b). As USEC Defendants note, the allegations against the individuals are for the most part so vague and conclusory that they do not allow each to know how he, in particular, is alleged to have participated in the Colleges' conduct. Relators do specify that Nathanson executed the PPAs. However, they do not identify the time, place and date of the alleged fraudulent or false statements for either Gedney or Lindsey. The only other allegations of wrong-doing

against the individual Defendants are collective accusations that attribute every act of the Colleges to each individual. Therefore, the Court finds that the SAC fails to meet Rule 9(b)'s particularity requirement with respect to the allegations against Defendants Gedney or Lindsey.

B. Almich

Almich also moves for dismissal pursuant to Rule 9(b) on grounds, among others, that it did not provide services for the Colleges during the times of specifically alleged fraud, if any.

In the SAC, Relators specify the years in which Almich conducted compliance examinations or financial statement audits; the last fiscal year for which Almich is alleged to have provided its services to the Colleges is 2002. The SAC makes clear that Almich's liability is premised on the Colleges' alleged failure to comply with federal law governing recruiter compensation. SAC ¶ 44. However, all of the SAC's specific, dated allegations of conduct in violation of the HEA refer to 2003 or later. Therefore, even if those allegations had met the requirements of Rule 9(b) with respect to the USEC Defendants, they would be insufficient to state with particularity circumstances for which Almich could be held liable for false or fraudulent statements.

CONCLUSION

For the foregoing reasons, USEC Defendants and Almich's motions to dismiss Relators' complaint (Docket Nos. 87 and 8, respectively) are GRANTED.

Because counsel stated at oral argument that Relators did not seek leave to amend to remedy the deficiencies identified by the Court, the dismissal is with prejudice.

USEC Defendants' request for judicial notice (Docket No. 26) is DENIED as moot. Judgment shall be entered in Defendants' favor; each side shall bear its own costs. The Clerk shall close the case file.

IT IS SO ORDERED.

Dated: 10/5/05

/s/ _____
CLAUDIA WILKEN
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 04-320 CW

[Filed July 13, 2005]

UNITED STATES OF AMERICA, Ex Rel. MOUNTHASONE BOTT and SUSAN NEWMAN,	)
Plaintiffs,	)
v.	)
SILICON VALLEY COLLEGES, et al.,	)
Defendants.	)

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

Defendants U.S. Education Corporation (USEC), Silicon Valley Colleges, Western Career Colleges, Greg Nathanson, Ellis Gedney, Darryl Lindsey, Barbara Bickett, George Montgomery and Leslie E. Pritchard (collectively, USEC Defendants) move pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b) to

dismiss the first amended complaint (FAC) of Relators Mounthasone Bott and Susan Newman (collectively, Relators). Defendants Weworski & Associates (Weworski) and Almich & Associates (Almich) each separately move to dismiss the FAC on the same grounds. Relators oppose the motions. The matter was heard on July 1, 2005. Having considered all of the papers filed by the parties and oral argument on the motion, the Court grants the motions to dismiss.

BACKGROUND

Relators bring this *qui tam* action under the False Claims Act (FCA), 31 U.S.C. § 3729 *et seq*, against all Defendants on behalf of the United States to recover all federal educational grants, including Pell Grants, and all payments on federally insured educational loans used to fund students at SVC and WCC.

According to the FAC, SVC and WCC (hereinafter referred to collectively as the Colleges) are California corporations and "'proprietary institution[s] of higher education'" with multiple campuses in the San Francisco Bay Area region. FAC ¶ 24. They are subsidiaries of USEC, also a California corporation. Individual USEC Defendants Nathanson, Gedney, Lindsey, Bickett, Montgomery and Pritchard are executives, owners or administrators of USEC or its subsidiaries. Weworski is a certified public accountancy (CPA) firm in San Diego, California, that has conducted compliance examinations and financial audits for the Colleges. Almich is a CPA firm in Irvine, California, that has also conducted compliance examinations and financial audits for the Colleges.

Relators Bott and Newman were formerly employed as admissions representatives at the San Jose campus of SVC in 2003.

Relators allege that the Colleges falsely certified that they were in compliance with applicable federal law prohibiting incentive payments to admissions representatives. In order to be eligible to participate in the grant and loan programs authorized by Title IV of the Higher Education Act (HEA), 20 U.S.C. § 1070 *et seq.*, an institution must enter into a Program Act (FCA), 31 U.S.C. § 3729 *et seq*, against all Defendants on Participation Agreement (PPA) with the Secretary of Education.

20 U.S.C. § 1094(a). The PPA conditions the Colleges' eligibility upon compliance with certain requirements, *inter alia*,

> The institution will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance . . . .

Id. § 1094(a)(20). The Department of Education (ED) has promulgated "safe harbor" regulations, which clarify that institutions may provide their admissions representatives with

> fixed compensation, such as a fixed annual salary or a fixed hourly wage, as long as that

> compensation is not adjusted up or down more than twice during any twelve month period, and any adjustment is not based solely on the number of students recruited, admitted, enrolled, or awarded financial aid. For this purpose, an increase in fixed compensation resulting from a cost of living increase that is paid to all or substantially all full-time employees is not considered an adjustment.

34 C.F.R. § 668.14(b)(22)(ii)(A). Nothing in the statute or the regulations addresses the conditions under which an institution may terminate its admissions representatives.

In addition to the PPA, HEA requires that participating institutions submit to the ED the results of annual audits. 20 U.S.C. § 1094(c)(1)(A)(i). These audits must be conducted by a qualified, independent organization "in accordance with standards established by the American Institute of Certified Public Accountants." 20 U.S.C. § 1099c(c)(5).

Relators allege that the Colleges pay their admissions representatives based on an incentive salary structure, in violation of the HEA, 20 U.S.C. § 1094(a)(20). Specifically, according to the FAC, a "so-called 'salary' was paid to Relators, and to all other recruiters employed at the Colleges' campuses, that was directly tied to an enrollment quota for that recruiter." FAC ¶ 47. Pursuant to this arrangement, recruiters who failed to enroll their minimum quota were terminated, while those who exceeded the minimum quota were retained and given raises. In addition, admissions representatives who failed to

"convert" a minimum percentage of leads into enrollments were also terminated.

Relators identify two potential categories of resulting false certifications or false statements by USEC Defendants. First is the PPA, in which the Colleges agree to comply with all the requirements of 20 U.S.C. § 1094(a), including the ban on incentive compensation, in order to become eligible for participation in HEA programs. Second, Relators allege that the Colleges' management made false statements of compliance with the HEA to its auditors, which statements were then transmitted to the federal government as part of the annual audit. FAC ¶ 57-58.

Relators' claims against Weworski and Almich, referred to in the Complaint collectively as "Accountants," arise out of accounting services provided to the Colleges in connection with the annual audit requirements. Weworski and Almich allegedly falsely certified to the ED that they had audited financial statements in accordance with Generally Accepted Accounting Standards, that those financial statements were fairly presented in accordance with Generally Accepted Accounting Principles, and that the Colleges were in compliance with elgibility requirements. *Id.* ¶ 51-52. In addition, the Accountants allegedly "deliberately concealed and excluded from their compliance reports that [the Colleges'] recruiter compensation practices violated federal statutes." *Id.* ¶ 91. Relying on "doubtful explanations of management" about the compensation policy, Weworski and Almich allegedly failed to expand the scope of its audit, to evaluate critically the Colleges' high enrollment figures and high turnover of

admissions employees, or to seek an outside opinion regarding the legality of the Colleges' compensation practices, instead "interpret[ing] the law according to the companies' desires." *Id.* ¶¶ 105-109.

On May 26, 2004, the United States filed a Notice of Election declining to intervene in this case. However, the government has filed a document stating its position regarding some of the legal issues raised in the motions to dismiss.

LEGAL STANDARD

I. Motion for Dismissal under Rule 12(b)(6)

A motion to dismiss for failure to state a claim will be denied unless it is "clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Falkowski v. Imation Corp.*, 309 F.3d 1123, 1132 (9th Cir. 2002), *citing Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." Fed. R. Civ. P. 8(e). These rules "do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

When granting a motion to dismiss, a court is generally required to grant a plaintiff leave to amend, even if no request to amend the pleading was made, unless amendment would be futile. *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment would be futile, a court examines whether the complaint could be amended to cure the defect requiring dismissal "without contradicting any of the allegations of [the] original complaint." *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990). Leave to amend should be liberally granted, but an amended complaint cannot allege facts inconsistent with the challenged pleading. *Id.* at 296-97.

II. Special Pleading Standards

"In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). The allegations must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). Statements of the time, place and nature of the alleged fraudulent activities are sufficient, *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987), provided the plaintiff sets forth "what is false or misleading about a statement, and why it is false." *In re GlenFed, Inc., Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994). Scienter may be averred generally, simply by saying that it existed. *See id.* at 1547; *see* Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge, and other condition of mind of a person

may be averred generally"). As to matters peculiarly within the opposing party's knowledge, pleadings based on information and belief may satisfy Rule 9(b) if they also state the facts on which the belief is founded. *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987).

JUDICIAL NOTICE

USEC Defendants and Almich request that the Court take judicial notice of several unpublished district court cases dismissing similar claims against other for-profit institutions of higher education. USEC Defendants' Request for Judicial Notice, Ex. A, *United States ex rel. Hendow v. University of Phoenix*, No. S-03-457 GEB DAD (E.D. Cal. May 20, 2004), *appeal docketed*, No. 04-16247 (9th Cir. June 21, 2004), and Ex. B., *United States ex rel. Bowman v. Education America, Inc.*, No. H-00-3028 (S.D. Tex. Jan. 8, 2004); Almich's Request for Judicial Notice, Ex. A. (*Hendow*), Ex. B (*Bowman*) and Ex. C (*America ex rel. Main v. Oakland City University*, No. 3:03-CV-71 RLY-WGH (S.D. Ind. March 15, 2005). Relators do not object to judicial notice of *Hendow*, and ask the Court to take judicial notice of amicus briefs filed by the Solicitor General on the appeal of *Hendow* and on another pending case involving "reverse false claims," *United States ex rel. Bahrani v. Conagra, Inc.*, No. 04-1407 (10th Cir. 2004). However, Relators object to USEC Defendants' request for notice of *Bowman* on the grounds that it is unpublished, and seek a hearing on this issue.

Plaintiffs request that the Court take judicial notice of Senate Report No. 102-58, Abuses in Federal Student Aid Programs (1991).

Weworski and Almich request that the Court take judicial notice of the Audit Guide for Audits of Student Financial Assistance Programs at Participating Institutions and Institution Services (January 2000) written by the ED Office of the Inspector General, available online at http://ifap.ed.gov/aguides/attachments/sfgd2000.pdf. Relators do not object to this request.

Under Rule 201 of the Federal Rules of Evidence, a court may take judicial notice of facts that are not subject to reasonable dispute because they are either generally known or capable of accurate and ready determination. The Court takes judicial notice of *Hendow*. However, the Court denies all other requests for judicial notice as moot because they are unnecessary to resolve the motions. Relators' objection is likewise overruled as moot.

DISCUSSION

I. Dismissal under Rule 12(b)(6)

Relators' complaint alleges three counts of violation of the FCA. All Defendants contend that the complaint must be dismissed for failure to state a claim under Rule 12(b0(6) because *inter alia* USEC Defendants' acts, as alleged, fall within the safe harbor provisions of the ED's regulations.

Defendants argue that a system of recruitment quotas, in which those employees who fail to meet the minimum requirements are fired and those who exceed the minimum are retained and given raises, is conduct expressly permitted by an applicable ED regulation, 34 C.F.R. § 668.14(b)(22)(ii)(A). The ED's purpose in allowing semi-annual pay raises for admissions representatives was to describe payment arrangements that an institution could carry out "that have been determined not to violate the incentive compensation prohibition." Dep't of Ed., Federal Student Aid Programs, 67 Fed. Reg. 67,048, 67,053 (Nov. 1, 2002). Although pay adjustments may not be based "solely" on the number of students recruited, the ED promulgated the safe harbor provision based on its understanding that the "HEA did not imply that institutions could not base salaries or salary increases on merit." *Id.* at 67,053. Furthermore, as Defendants note, nothing in the HEA or in the ED's regulations otherwise regulates the hiring and firing of admissions representatives or an institution's ability to set mandatory recruitment quotas. *See Original Honey Baked Ham Co. v. Glickman*, 172 F.3d 885, 887 (D.C. Cir. 1999) ("A statute listing the things it does cover exempts, by omission, the things it does not list.").

Relators characterize those regulations as an unconstitutional modification of the statute, by which the ED exceeded the authority granted it by Congress and circumvented the failure of a legislative effort to loosen the HEA language. Relators' Opp. to USEC Defs.' Mot. Dismiss at 20-23. According to Relators, the ED safe harbor provisions have "effectively legalized the conduct directly prohibited in the Higher

Education Act." Relators' Opp. to Almich's Mot. Dismiss at 10.

Relators' focus on the unconstitutionality of the safe harbor regulations undermines the basis for their FCA claims. First, Relators' allegation that the Colleges' system of firing or promoting their admissions representatives violated federal laws is the only basis for Relators' contention that Defendants submitted "false or fraudulent" claims or statements to the government. Submission of false or fraudulent claims is an essential element of an FCA action. 31 U.S.C. § 3729(a)(1-3). The purpose of the safe harbor provision was to specify arrangements that did *not* violate the statute, and therefore Defendants were entitled to represent that they had complied with the law if their practices were protected by the regulations. *See Lucky v. Baxter Healthcare Corp.*, 183 F.3d 730, 732 (7th Cir. 1999) (noting that if an FCA defendant "complies with the existing regulations, it is entitled to represent to the government (and the world) that it has done so, without facing a claim of deception"). In fact, Relators have not alleged any conduct that falls outside the safe harbor regulations. For example, they have not alleged that the Colleges provide more than two salary adjustments in a year not related to cost-of-living, or adjustments based "solely on the number of students" recruited.

Furthermore, assuming *arguendo* that the safe harbor provision is unconstitutional and Defendants' acts did not comply with the HEA, Relators still cannot show that Defendants "knowingly" submitted false or fraudulent claims, another essential element. *See* 31 U.S.C. § 3729(a)(1-2). Neither the USEC Defendants

nor their accountants can be said to have possessed the requisite scienter, which is "'the knowing presentation of what is known to be false,'" if they were complying with ED regulations. *United States ex rel. Hochman v. Nackman*, 145 F.3d 1069, 1073 (9th Cir. 1998) (quoting *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991)). In *Hochman*, the court found that FCA defendants lacked the requisite scienter where they relied on agency guidelines, despite the fact that those guidelines were potentially inconsistent with other requirements. Here, the ED promulgated regulations precisely in order to clarify the governing law, and Defendants' reliance on those regulations precludes their FCA liability.

For these reasons, the Court grants Defendants' motions to dismiss for failure to state a claim under the FCA. Relators are granted leave to file a second amended complaint that addresses these deficiencies.

II. Failure to Meet Pleading Requirements

As in any cause of action sounding in fraud, the allegations of a FCA claim must be plead with particularity. *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001). As such, they must be "'specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.'" *Id.* at 1019 (quoting *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993)). However, "Rule 9(b) may not require [the plaintiff] to allege, in detail, all facts supporting each and every instance of [a FCA

claim] over a multi-year period." *United States ex rel. Lee v. Smithkline Beecham, Inc.*, 245 F.3d 1048, 1051 (9th Cir. 2001).

While Relators have attempted to plead the elements of an FCA claim with respect to the Colleges and USEC (which allegedly "controls and directs" the Colleges' activities), the complaint contains no details regarding the liability of any of the individual USEC Defendants. Without any specific allegations against them, the individual Defendants cannot know how they are alleged to have participated in the Colleges' conduct, and how to respond to the complaint. If Relators choose to name individual Defendants in their SAC, they must meet the requirements of Rule 9(b) with respect to each.

Similarly, Relators' allegations against "Accountants" fail to specify which particular allegedly false or fraudulent claims or statements were done when and by whom. If Relators choose to name the accountant Defendants in their SAC, they must meet the requirements of Rule 9(b) and do so with respect to each firm separately.

CONCLUSION

For the foregoing reasons, USEC Defendants, Weworski and Almich's motions to dismiss Relators' complaint are GRANTED (Docket Nos. 24, 41 and 58, respectively).

Relators may file a SAC in accordance with the instructions above if they can do so truthfully and without contradicting the FAC. As the Court ruled at

the hearing, Relators must file any SAC within three weeks from the hearing date; any answer will be due three weeks later. Motions to dismiss must be noticed for September 16, 2005, at 10:00 a.m., at which time the Court will also hold a case management conference.

USEC Defendants' request for judicial notice (Docket No. 26) is GRANTED in part and otherwise DENIED as moot. Relators' first request for judicial notice (Docket No. 37) is GRANTED, but their second request for judicial notice is DENIED as moot (Docket No. 75). Weworski and Almich's requests for judicial notice are DENIED as moot (Docket Nos. 43, 60 and 78).

IT IS SO ORDERED.

Dated: 7/13/05

/s/ CLAUDIA WILKEN
CLAUDIA WILKEN
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-15423
D.C. No. V-04-00320-CW

[Filed March 31, 2008]

UNITED STATES of America, ex rel. MOUNTHASONE BOTT; UNITED STATES of America, ex rel. SUSAN NEWMAN,

Plaintiffs-Appellants,

v.

SILICON VALLEY COLLEGES; WESTERN CAREER COLLEGES; GREG NATHANSON; ELLIS C. GEDNEY; DARRYL LINDSEY; STEVE GALLAGHER; BARBARA BICKETT; JANETTE C. MARQUEZ; PATRICK SUTHERLAND; U.S. EDUCATION CORPORATION, GEORGE MONTGOMERY; LESLIE E. PRITCHARD; ALMICH & ASSOCIATES,

Defendants-Appellees.

ORDER

Before **KOZINSKI**, Chief Judge, **COWEN*** and **HAWKINS**, Circuit Judges.

The petition for rehearing and rehearing en banc is denied *See* Fed. R. App. P. 35; Fed. R. App. P. 40.

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* The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.